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LESSOR LIABILITY

Florida Supreme Court Limits Pre-Emptive Effect of Federal Owner/Lessor Liability Statute in *Vreeland v. Ferrer*

Our Spring 2008 Newsletter discussed the liability of non-operating aircraft owners and lessors, such as owners in trust and finance or capital lessors, to passengers and property owners arising out of aircraft accidents.

The focus was on a federal statute, 49 U.S.C. § 44112(b), which shields an owner, lessor, or secured party (“owner,” for short) of an aircraft, engine, or propeller (“aircraft”) from liability for injuries, death, or property damage the aircraft caused “on land or water” when it was not in the owner’s “actual possession or control.”

Section 44112(b) was enacted in 1948 to shield security holders in aircraft from the vicarious liability they might otherwise incur under state law.¹ A bailor of property ordinarily is not liable for the negligence of a bailee. The Uniform Aeronautics Act (“UAA”), which a number of states enacted in commercial aviation’s pioneer era, altered this rule by making aircraft owners and lessors absolutely liable for injuries to people and property on the ground caused by their aircraft while in flight. Even without the UAA, some states considered aircraft “dangerous instrumentalities” (and, in the case of Florida, still do), thus making their non-operating owners vicariously liable for operator negligence.

Aircraft integrity and commercial aviation had advanced quite a bit between the time the UAA was promulgated (a draft was published in 1922) and 1948, when Section 44112(b) was enacted. Commensurate with increases in aircraft size and sophistication was an increase in aircraft price. Operators required financing to purchase aircraft, and financiers naturally took security interests in the purchases they financed. With security interests came certain rights, such as a right to repossess, which could be construed as an indication of ownership—and a basis for absolute liability under the UAA. This exposure was a cause of concern for finance companies and by extension the burgeoning commercial aviation industry.

Section 44112(b) resolved this problem, shielding mere security holders in liability from the absolute liability imposed by the UAA. (As a federal statute, Section 44112(b) pre-empts any state law in direct conflict with it.) The paucity of reported decisions on the statute indicates that vicarious liability was largely a non-issue for the next fifty years or so. This changed with the growth of the aircraft finance industry and the increased use of trusts and finance leasing. In 1994, Section 44112(b) was amended to confirm that it covered “owners” and “lessors” as well as security holders—at least so long as they were not in “actual possession or control” of an aircraft that caused injury “on land or water.”

Our Spring 2008 Newsletter discussed recent divergent opinions concerning the “actual possession or control” qualification. It also noted

that these courts had not addressed the effect of the “land or water” limitation on passenger injury claims. A couple of the few older decisions construing the statute concluded it did not apply to such claims at all.²

Since publication, the Florida state courts addressed this issue in the *Vreeland v. Ferrer*³ litigation. The trial and appellate courts initially concluded that Section 44112(b) pre-empted Florida’s “dangerous instrumentality” doctrine in passenger death cases—at least if the death arises out of terrain impact. This holding did not last. The Florida Supreme Court disagreed and quashed the appellate court’s decision.

In *Vreeland*, the plaintiff was the personal representative of the estate of a passenger on a Cessna Skymaster that crashed shortly after takeoff from an airport in Lakeland, Florida. He sued the aircraft owner, Aerolease of America, on theories of vicarious liability (*i.e.*, the lessor’s legal liability for the pilot’s negligence) and actual negligence (*i.e.*, allegations that the lessor itself had contributed to the cause of the accident by negligently inspecting and maintaining the aircraft and publishing false information concerning its condition).

The trial court concluded that Section 44112(b) pre-empted all claims against the lessor and dismissed. The District Court of Appeal reversed and reinstated the claims based on actual liability but affirmed summary judgment on the vicarious liability claims.⁴

It was undisputed, according to the appellate court, that the owner was “not in actual possession or control” of the aircraft when the accident occurred. As for the “land or water” limitation, the court reviewed the aging *Storie* and *Sexton* decisions (*see* note 3 above) but found them unpersuasive. “[T]hose cases do not explain why an airplane crash does not cause an injury on the surface of the earth regardless of whether the injured person was in the airplane or standing on the ground.”⁵ The estate appealed to the court of last resort—the Florida Supreme Court. There, it prevailed.

The Florida Supreme Court reviewed Section 44112(b) in the context of the UAA.⁶ As noted

above, the UAA imposed absolute liability for ground injuries. It had a separate provision governing liability to passengers, pursuant to which an owner or lessor was liable to the same extent as under state law.⁷ Since the decedent was a passenger, not a person on the ground outside the aircraft, Section 44112(b) had no application to the facts of the case.

The practical effect of *Vreeland* remains to be seen. It is obviously significant in litigation in the Florida state courts, where it is binding authority.⁸ It is not binding on the courts of any other state, although it may or may not be respected as “persuasive authority.” The same is true for the federal district courts, which look to their respective circuit courts of appeal (and of course the United States Supreme Court) for rulings on federal law. Florida has been in the Eleventh Circuit since it was created in 1981, and the Eleventh Circuit Court of Appeals does not appear to have addressed this issue yet. It may be noted, however, that a 1970 Fifth Circuit decision, consistent with *Vreeland*, concluded that former Section 1404 (*see* note 2) “[o]n its face [was] enacted to facilitate financing of the purchase of aircraft by providing that those holding security interests would not be liable for injuries caused by falling planes or the parts thereof.”⁹ This decision may be binding on the Florida federal district courts, as Florida was part of the Fifth Circuit in 1970.¹⁰

The Florida Supreme Court’s decision in *Vreeland* is not an aberration. It is consistent with judicial constructions of former Section 1404 and closing the UAA loophole. If, however, Congress intended to encourage aircraft financing by shielding “mere owners” (aircraft financiers) from excessive liability exposure—and this apparently was an objective—it seems somewhat arbitrary that exposure was curtailed only with respect to ground injuries. Despite some horrific examples to the contrary, ground injuries are probably not the first concern of a prospective financier.

The “land or water” limitation should be deleted, and while Congress is at it any clarification on the meaning of “actual possession or control” (every financier has some sort of “control” over its security interest) would be welcome.

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¹ The statute was originally codified at 49 U.S.C. § 524, later recodified at 49 U.S.C. § 1404, and finally recodified at 49 U.S.C. §44112 in 1994.

The 1994 revisions split the former statute into two sections. Section 44112(a), a definitional section that added references to “owners” and lessors.” Former Section 1404 was incorporated into Section 44112(b), with some revisions, including shortening the original “on the surface of the earth (whether on land or water)” to “on land or water.” According to the Legislative History, no substantive changes were intended.

² See *Storie v. Southfield Leasing, Inc.*, 282 N.W.2d 417 (Mich. App. 1979) (passengers not on “surface of the earth”), *aff’d on other grounds sub nom. Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843 (Mich. 1982); *McCord v. Dixie Aviation Corp.*, 450 F.2d 1129 (10th Cir. 1971) (Section 1404 applies also to owners, but not to passengers injured in aircraft accident because they were not on “surface of the earth”); see also *Rogers v. Ray Gardner Flying Serv., Inc.*, 435 F.2d 1389, 1394 (5th Cir. 1970) (as quoted in main text at note 9 below, statute applies to “falling planes or parts thereof”).

³ --- So. 3d ---, 2011 WL 2562187 (Fla. July 8, 2011). The aircraft owner has moved for reconsideration.

⁴ 28 So. 3d 906 (Fla. 2d DCA 2010).

⁵ 28 So. 3d at 911. The appellate court did not discuss why there was no immunity in the case of mid-air collisions, in-flight breakups, or in-flight cabin depressurizations.

⁶ In dissent, Justice Ricky Polston argued that the statute was unambiguous and, citing only the lower appellate court in support, concluded that the statute applied because the decedent died “‘on land,’ not in the aircraft prior to contact with land.” -- So. 3d --, 2011 WL 2652187 at *15.

⁷ The UAA also extended state sovereignty into the space above the lands and waters of the state, so “state law” refers to the law of the state in whose airspace an aircraft operates. (Obviously, subsequent federal legislation has affected states’ rights with respect to airspace regulation.) Incidentally, many states enacted automobile “guest statutes” around the same time (the 1920’s and 1930’s) they were adopting the UAA. Under a guest statute, a passenger cannot sue the driver for injuries unless caused by recklessness. To the extent any court considered an aircraft a “dangerous instrumentality,” a passenger also might be barred from suit under the common law doctrine of “assumption of risk.” Owners and lessors accordingly were not absolutely liable for passenger injuries, and in many cases might have been immune from passenger suits. This moreover assumes they had passengers—there were commercial flights in the U.S. as early as 1914, but they were still somewhat rare when the first draft of the UAA was published in 1922.

⁸ As discussed in earlier Newsletters, owners may be named as defendants for strategic reasons without regard to actual liability exposure. For instance, the presence of U.S. defendants may be cited in opposition to a motion to dismiss for *forum non conveniens*, and the presence of an in-state defendant may preclude removal of an action filed in state court to the local federal court on diversity grounds.

⁹ *Rogers v. Ray Gardner Flying Serv., Inc.*, 435 F.2d 1389, 1394 (5th Cir. 1970) (emphasis added).

¹⁰ *Bonner v. City of Prichard*, 661 F.2d 1206 (1981) (Fifth Circuit decisions prior to September 30, 1981 will be treated as binding precedent in the Eleventh Circuit).